



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 242**

**[Docket DARS-2022-0025]**

**RIN 0750-AL20**

**Defense Federal Acquisition Regulation Supplement: Quick-Closeout Procedures Threshold (DFARS Case 2021-D001)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a recommendation from the Government Accountability Office regarding quick-closeout procedures.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2021-D001, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2021-D001." Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2021-D001" on any attached documents.

o Email: *osd.dfars@mail.mil*. Include DFARS Case 2021-D001 in the subject line of the message.

Comments received generally will be posted without change to *<https://www.regulations.gov>*, including any personal information provided. To confirm receipt of your comment(s), please check *<https://www.regulations.gov>*, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** David E. Johnson, telephone 202-913-5764.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to amend the DFARS to implement a recommendation made by the Government Accountability Office (GAO) in GAO Report 17-738, *Federal Contracting: Additional Management Attention and Action Needed to Close Contracts and Reduce Audit Backlog*, published in September 2017. In this report, GAO recommended that DoD develop a means for DoD-wide oversight into both components' progress in meeting goals on closing contracts and the status of contracts eligible for closeout. Additionally, the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel) recommended authorizing the settlement of final overhead rates when it is in the best interest of the Government and closing complete contracts regardless of dollar value or the percentage of unsettled direct and indirect costs allocable to the contracts (recommendation 58). The Section 809 Panel was

established pursuant to section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92) to deliver recommendations that could transform the defense acquisition system to meet the threats and demands of the 21st century.

As a result of the GAO and Section 809 Panel recommendations, DoD proposes to update the quick-closeout procedures and expand contracts eligible for quick closeout. In lieu of the thresholds at Federal Acquisition Regulation (FAR) 42.708(a)(2)(i) and (ii), this proposed rule provides that cost amounts are insignificant when unsettled direct and indirect costs are less than \$2 million on a contract, task order, or delivery order, regardless of the total contract, task order, or delivery order amount. Additionally, Defense Contract Management Agency (DCMA) administrative contracting officers may negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the determination of final direct costs and indirect rates set forth in FAR 42.705 regardless of the dollar value or percentage of unsettled direct or indirect costs allocable to the contract.

## **II. Discussion and Analysis**

This proposed rule establishes a DoD-specific threshold for quick-closeout procedures. Instead of the threshold at FAR 42.708 of \$1 million or 10 percent of the total value, DoD contracting officers will use a threshold of \$2 million for

contracts, task orders, and delivery orders. DCMA administrative contracting officers may negotiate the settlement of direct and indirect costs prior to the determination of final direct costs and indirect rates regardless of dollar value or percent of unsettled direct or indirect costs allocable to the contract. The proposed changes at DFARS 242.708 will increase the number of DoD contracts subject to quick-closeout procedures.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services**

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the SAT, for commercial services, or for commercial products including COTS items.

### **IV. Expected Impact of the Rule**

Presently, at FAR 42.708(a)(2), cost amounts are considered relatively insignificant when the total unsettled direct costs and indirect costs to be allocated to any contract, task order, or delivery order does not exceed the lesser of \$1 million or 10 percent of the total contract, task order, or delivery order. The proposed rule establishes a DoD-specific threshold of \$2 million. The proposed rule also allows DCMA administrative contracting officers to negotiate the settlement of direct and

indirect costs to be closed in advance of the determination of final direct costs and indirect rates regardless of the dollar value or percentage.

By establishing a higher threshold for DoD, this proposed rule expands the number of contracts subject to quick-closeout procedures. This rule will be beneficial to contractors and to the Government by promoting administrative efficiencies. DCMA administrative contracting officers' workflows will be expedited since settlement of costs may be negotiated prior to determination of final direct costs and indirect rates regardless of the dollar value or percent of unsettled direct or indirect costs allocable to the contract.

## **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

## **VII. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because no additional administrative burden will be placed on small entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to revise the DFARS to implement changes to the indirect cost rate quick-closeout procedures. GAO Report 17-738, Federal Contracting: Additional Management Attention and Action Needed to Close Contracts and Reduce Audit Backlog, published September 2017 recommended that DoD develop a means for Department-wide oversight into both components' progress in meeting goals on closing contracts and the status of contracts eligible for closeout. The Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel) was established pursuant to section 809 of the National Defense

Authorization Act for Fiscal Year 2016 (Pub. L. 114-92) to deliver recommendations that could transform the defense acquisition system to meet the threats and demands of the 21<sup>st</sup> century. Additionally, the Section 809 Panel recommended authorizing the settlement of final overhead rates when it is in the best interest of the Government and closing complete contracts regardless of dollar value or the percentage of unsettled direct and indirect costs allocable to the contracts (recommendation 58).

This proposed rule states that the amount of unsettled direct costs and indirect costs to be allocated to the contract, task order, or delivery order will be considered relatively insignificant when the total unsettled direct costs or indirect costs to be allocated do not exceed \$2 million. Additionally, DCMA administrative contracting officers may negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the determination of final direct costs and indirect rates set forth in FAR 42.705 regardless of the dollar value or percentage of unsettled direct or indirect costs allocable to the contract.

The objective of the proposed rule is to implement the GAO and Section 809 Panel recommendations described above. The legal basis for the rule is 41 U.S.C. 1303.

This proposed rule will likely affect small entities that have been or will be awarded contracts, task orders, and delivery orders valued over \$2 million. Data was obtained from the

Procurement Business Intelligence Service (PBIS) for contracts that were awarded in fiscal years 2019 through 2021 and eligible for quick-closeout procedures, were valued at more than \$2 million, and contained one of the following FAR clauses:

- 52.216-7, Allowable Cost and Payment (including Alternates I, II, IV);
- 52.216-17, Incentive Price Revision—Successive Targets (including Alternate I);
- 52.242-3, Penalties for Unallowable Costs; and
- 52.242-4, Certification of Final Indirect Costs.

Data from PBIS revealed DoD awarded contracts to an average of 832 small businesses per year in fiscal years 2019 through 2021. Therefore, this proposed rule may apply to approximately 832 unique small entities.

The proposed rule does not impose any new reporting, recordkeeping, or compliance requirements.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because this proposed rule is not expected to have a significant impact on small entities.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.



DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2021-D001), in correspondence.

#### **VIII. Paperwork Reduction Act**

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Part 242**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 242 is proposed to be amended as follows:

#### **PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

1. The authority citation for 48 CFR part 242 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Add section 242.708 to read as follows:

#### **242.708 Quick-closeout procedure.**

(a) Defense Contract Management Agency administrative contracting officers are authorized to negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the

determination of final direct costs and indirect rates set forth in FAR 42.705, regardless of the dollar value or percentage of unsettled direct or indirect costs allocable to the contract, task order, or delivery order.

(2) In lieu of the thresholds at FAR 42.708(a)(2)(i) and (ii), the amount of unsettled direct costs and indirect costs to be allocated to the contract, task order, or delivery order will be considered relatively insignificant when the total unsettled direct costs and indirect costs to be allocated to any one contract, task order, or delivery order do not exceed \$2 million, regardless of the total contract, task order, or delivery order amount.